

Bleistein; or, *Intellectual Property Law and the Problem of Aesthetic Progress*

Barton Beebe

Professor of Law, NYU School of Law
barton.beebe@nyu.edu

The Intellectual Property Clause of the U.S. Constitution empowers Congress “to promote the Progress of Science and useful Arts.” Strangely, in speaking only of the “useful Arts,” the clause takes pains to exclude any reference to a rather significant category of intellectual achievement: the fine arts. Working from this strange and previously unremarked aporia in the constitutional text itself, this paper asserts that from its very origins in the Intellectual Property Clause, U.S. intellectual property law has had a profound problem with the aesthetic, and not just with fine art, but with all aesthetic expression if not all aesthetic experience. While intellectual property law has not hesitated closely to engage the purportedly non-aesthetic world of the “useful,” the “utilitarian,” or the “functional,” it has struggled to define what aesthetic works are, how they should be judged, and what utility, if any, they possess. The result has been doctrinal incoherence, examples of which appear throughout American law: in trademark law’s unlikely concept of “aesthetic functionality”; in copyright law’s fantastical definition of the “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article”; in one test for copyright infringement, which asks judges to determine whether the “ordinary observer,” upon seeing the parties’ works, would “regard their aesthetic appeal as the same”; or in design patent’s test for aesthetic “non-obviousness” in light of the prior art, the essence of which one judge characterized as “Gee, they look pretty much the same to me.” The common root of these and many other such problems, I suggest, is that American intellectual property law has refused to reconcile the law’s fundamental purpose, the promotion of progress, with the aesthetic. Our intellectual property law and commentary speak routinely of the progress of knowledge and technology—the progress, that is, of instrumental reason. But, like the framers, we cannot seem to bring ourselves to speak of aesthetic progress.

There is a reason for this, and it is found in the history of American copyright law, and in particular, in the 1903 Supreme Court case of *Bleistein v. Donaldson Lithographing Company*. The purpose of this paper is to evaluate how *Bleistein* extinguished the concept of aesthetic progress in U.S. copyright law, what the consequences of this loss have been, and how and to what end the concept might be revived. In an effort to demystify somewhat the admittedly highly enigmatic concept of aesthetic progress, Part I reviews the early history of the concept in the eighteenth century and then draws upon the increasingly influential school of aesthetic thought known as “pragmatist” or “everyday aesthetics” to begin outlining a contemporary understanding of the concept. Part II recounts the story of aesthetic progress in the copyright case law, from its quite modest emergence in the late-nineteenth century to the draconian reaction in *Bleistein* itself. Part III returns to the issue of how we should define aesthetic progress and what role, if any, the concept should play in intellectual property law going forward.